

4/3/06
(S)UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTSSAVINGS BANKS EMPLOYEES
RETIREMENT ASSOCIATION,

Plaintiff,

v.

EAST BOSTON SAVINGS BANK;
BELMONT SAVINGS BANK; CAPE
COD FIVE CENTS SAVINGS BANK;
BRIDGEWATER SAVINGS BANK;
SOUTH SHORE SAVINGS BANK;
BERKSHIRE SAVINGS BANK; and
WORONOCO SAVINGS BANK,

Defendants.

CIVIL ACTION NO. 04-11545-EFH

DEFENDANTS' RULE 52(c) MOTION

While the Defendant Banks acknowledge that the weight of authority dictates that they bear the burden of proof on their affirmative defense of unfair penalty (*Honey Dew Associates, Inc v. M & K. Food Corp.*, 241 F. 3d 23, 27 (1st. Cir. 2004), SBERA, the Plaintiff here, still must prove the existence of a contract between the parties, enforceable but for the penalty provision.

Indeed, in his deposition, SBERA's 30(b)(6) designee, Thomas Forese, Jr. the President and Plan Administrator of SBERA, testified at pages 44, lines 1-13:

Q. And in effect, you consider that [vote of the SBERA trustees that deals with termination fees] to be a binding contract because in effect you've sued on it to collect those termination fees?

A. Not a contract...[objection and attorney colloquy].

It's not a contract. You're a member of an association. When you're a member of an association, you live by the rules of the association. So there's no contract here.

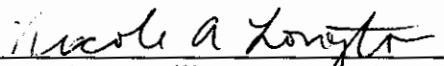
4-3-06
Defendants' Motion is
Denied. Edward F. Hennigh, S.D.

Also, when a self-interested contract is challenged, the burden is on the fiduciary to prove its fairness. *See Geller v. Allied-Lyons PLC*, 42 Mass. App. Ct. 120, 125 n.8 (1997) ("When a self-interested contract is challenged, the burden is on the fiduciary to prove its fairness").

SBERA, by resting upon the agreed facts, without more, has failed to sustain its burden of proof, and the Banks seek judgment under Fed. R. Civ. P. 52(c). *See United States v. Davis*, 261 F.3d 1 (1st. Cir. 2001); *Geddes v. Northwest Missouri State University*, 49 F.3d 426 (8th. Cir. 1995); *Wesschler v. Hunt Health Systems, Ltd.* 330 F. Supp. 2d 383, 433 (S.D.N.Y 2004).

Respectfully Submitted,
EAST BOSTON SAVINGS BANK,
CAPE COD FIVE CENTS SAVINGS
BANK, SOUTH SHORE SAVINGS
BANK, and BERKSHIRE BANK,

by their attorneys,


James J. Marcellino, Esq., BBO # 318840
Nicole A. Colby Longton, Esq.,
BBO # 657478
MCDERMOTT WILL & EMERY, LLP
28 State Street
Boston, MA 02109-1775
(617) 535-4045

Dated: April 3, 2006